UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

KEVIN LANGSTON, Plaintiff,	**Docket#** 07-cv-2630(ERK)
- versus -	U.S. Courthouse Brooklyn, New York
JOSEPH SMITH, Defendant	April 14, 2010

TRANSCRIPT OF CIVIL CAUSE FOR CONFERENCE
BEFORE THE HONORABLE EDWARD R. KORMAN
UNITED STATES DISTRICT JUDGE

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Proceedings

THE CLERK: Langston v. Smith. Your appearances, counsel.

MR. LANDAU: For the petitioner, Warren S. Landau, Associated with Lynn Fahey of Appellate Advocates, attorney for petitioner.

MR. DENNEHY: For the respondent, Morgan Dennehy, Kings County District Attorney's Office.

MR. LANDAU: Your Honor, we come before the Court on a petition for habeas corpus. Our petition alleges one major ground and two points in support of that. We have alleged that there's insufficient evidence to support the accomplice liability of petitioner for the convictions of criminal possession of a weapon and first degree felony assault. And in addition, there was insufficient evidence proving that the assault of the Police Officer, Marquez (ph.) was in furtherance of the felony of criminal possession of a weapon. Because of this --

THE COURT: Sir, I quickly glanced over this, but he served a sentence on that; hasn't he?

MR. LANDAU: Well he is incarcerated, Your Honor.

THE COURT: No, no, but he's incarcerated on the other counts.

MR. LANDAU: Yes.

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THE COURT: In other words, he's already --

MR. LANDAU: He's incarcerated on the major count as far as I can tell.

THE COURT: Right. But he's basically -- you know if we had a rational concurrent sentence doctrine assuming the other sentences survive, this is really -- it almost -- it makes no difference in terms of his incarceration.

MR. LANDAU: Right. It's on the major count that, I mean -- New York Law has a provision that indicates that the sentence merge but that aside, yes, he's finished that portion of --

THE COURT: Well it didn't merge, it --

MR. LANDAU: Right.

THE COURT: Let's put it this way, if the only relief I gave you was on that, it wouldn't do him any good, realistically in terms of the time he would have to serve.

MR. LANDAU: It would not effect his time.

THE COURT: Right.

MR. LANDAU: But for that -- but for the second conviction, the more serious one, he would have been out of jail by now.

THE COURT: Right. Right.

MR. LANDAU: I think our papers pretty much

state our argument. There was -- we believe that due process was violated and that the Appellate Division did not engage in a reasonable -- did not arrive at a reasonable conclusion based on the facts of this case and the law in concluding that his conviction should be affirmed.

There was no evidence from which a rational jury could have concluded that petitioner had any advance knowledge that this was going to be a robbery as opposed to simple gun sale. And the gun sale wasn't what he was charged or at least wasn't what he was convicted of.

Furthermore, there's no evidence that -- from which a rational jury could have concluded that petitioner's -- that the felon -- that the assault of the Officer Marquez by some of the co-defendants was in furtherance of a criminal possession of a weapon and I note that the only weapon it could have been -- that could have been related to it would have been the 22 caliber --

THE COURT: You're getting me confused with all of these counts. Let's put aside the criminal possession of a weapon --

MR. LANDAU: Okay.

THE COURT: -- because it's really --

MR. LANDAU: Right.

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THE COURT: We can deal with it. I am not -- I am going to deal with it but I don't think it's really -- it's not consequential. So let's deal with the major --

MR. LANDAU: Right. I think it's only consequential because the assault conviction kind of piggybacks on the criminal possession conviction. That's why it's relevant, otherwise as we indicated earlier, his sentence is over on that.

But the People had to prove two things. They had to prove accomplice liability --

THE COURT: Right.

MR. LANDAU: -- on the criminal possession of a weapon and then they had to prove that the assault was in furtherance of the criminal possession of a weapon. We submit that the People did neither of these things. This was -- there was no advance knowledge that the defendant had that this was -- this was going to be a robbery, as opposed to a gun sale and no rational jury could have concluded that he did --

THE COURT: Why couldn't a -- I don't understand why a rational jury couldn't conclude that there was going to be a robbery here.

MR. LANDAU: Well, not that the -- but that he didn't -- that the petitioner knew of a robbery and therefore could have --

THE COURT: I think a rational juror could have. I mean Judge Gleeson states the facts, you know, in a fairly lucid way but it seems to me to be clear that a rational jury could have concluded that there was going to be a robbery here, that the whole purpose of this -- what was going on here was essentially to rip off two people who were coming to buy guns.

MR. LANDAU: Right. But the evidence does find --

THE COURT: Did they ever find guns that were supposed to have been the subject of the sale?

MR. DENNEHY: No, your Honor.

THE COURT: It's obvious there was never going to be a sale of guns.

MR. LANDAU: Right. But in evaluating petitioner's guilt as opposed to Cherry's guilt, we have to evaluate what the evidence shows about his knowledge. The fact that Cherry may have intended all along to rob the police does not -- you can't conclude merely from that alone that the petitioner was acting as an accomplice.

THE COURT: Well the question is whether -- not whether you must draw that inference but whether a reasonable jury could have drawn that inference.

MR. LANDAU: Right.

THE COURT: And also don't forget, they heard him testify and they -- their disbelief of his testimony can at least provide a partial basis for concluding, along with the other evidence, that the opposite of what he said was true.

MR. LANDAU: I'm not so sure that I agree with that, your Honor, but --

THE COURT: I think it's an accurate statement of the law.

MR. LANDAU: The bottom line is that my view is that nothing here showed his advance knowledge that Cherry was -- or Cherry or the others were going to be armed with a weapon, a 22 caliber and it had to be the 22 caliber.

THE COURT: Well if you accept the assumption that he knew that there was going to be a robbery, then he had to have known that the robbery was going to involve guns.

MR. LANDAU: I think that first the perspective that there was evidence that suggested that he knew about this, if it's there it stretches the limits of what a jury could do and what a court could find in this case. I would also point out that it would be fairly strange for petitioner intending this, knowing this, to have come to this encounter unarmed, engaged in no acts of

violence, done nothing threatening towards the police and positioned themselves in such a way as that they were effectively in the line of fire of apparently the three other co-defendants.

So all of this belies that there is some proof -- that there's sufficient proof that the petitioner could be said to have had knowledge of the robbery and therefore be connected to the possession of the 22 caliber.

In any event, getting to the second point, there is -- I think there's simply no rational basis to conclude that the assault could possibly be in furtherance of the possession of the 22 caliber weapon which has to be the case here. This is the -- the conviction is a New YOrk State conviction. It's based on New York law and New York law has to be applied and we submit that that rule is dictated by Bell, Malagon and Suggs (ph.), which we cited in our petition. It would just be completely irrational for the jury to have concluded that the shooting of Officer Marquez in any way was designed to further the possession of the 22 caliber gun which was clearly not the purported subject of the gun sale.

THE COURT: So the first degree assault -- let me just be sure, is dependent on the notion that he was

using -- is dependent on the finding that the purpose of the shooting was to prevent the other people from taking the gun.

MR. DENNEHY: That wasn't the way it was charged. It was simply charged -- the boilerplate language of the statute was read to the jury which means in the course of and in furtherance of, the Commission of the weapon possession crime. So it wasn't charged specifically that the jury had to find that it was -- the guns were used to prevent the detectives from taking their guns. That's simply a theory on which the jury could have concluded that the --

THE COURT: Well tell me what the jury -- the first degree assault, it was -- they had to find that it was done in the course of and in furtherance of or the commission of or attempted commission of the felony.

MR. DENNEHY: That's correct.

THE COURT: Or immediate flight therefrom, he or another participant, if there be any, cause serious physical injury to another person.

MR. DENNEHY: Right.

THE COURT: What was the felony?

MR. DENNEHY: The weapon possession. That's the way it was charged. And as Judge Gleeson pointed out in his decision, he called it -- he said it would be more

natural to say that the act was in furtherance of their meaning which was to rob the detectives. But a robbery wasn't charged and, in fact, a robbery -- the crime wasn't charged against the defendants and, in fact, the Judge declined to -- I don't know if a -- I don't think an application was even made. I think the Judge just took it upon himself to charge that the fact that the underlying felony was the weapon possession. So the assault had to be committed in the course of and in furtherance of the weapon possession.

THE COURT: It couldn't -- so it was because of the Judge's charge as opposed to anything else? It could have been in furtherance theoretically of the robbery.

MR. DENNEHY: Correct, it could have.

THE COURT: But the Judge gave this instruction.

MR. DENNEHY: The Judge instructed the jury that it had to be in furtherance of the weapon possession in this case; correct.

THE COURT: And so the whole -- so basically the whole thing stands or falls on the notion that the reason for the shooting was to prevent the other people from getting the guns.

MR. DENNEHY: Well that's an argument. There are other arguments to be made but there's a, as

Judge Gleeson pointed out, sufficient nexus between the actual use of the guns to evaluate the crime -- to commit the crime of criminal possession of a weapon in the second degree and the shooting of the detectives.

THE COURT: I know, but I mean --

MR. DENNEHY: It could have been to prevent the detectives from taking the guns but they come out with their guns, they're shooting their guns, thus committing the crime, completing the crime of second degree weapon possession. And in the course of that, they're firing shots at the detective, hitting the detective in the hand and causing the injury necessary for the first degree assault. So the two acts are sufficiently related to satisfy the in furtherance requirement.

I would like to point out that the New York courts have consistently construed that language in a very liberal fashion. It doesn't necessarily have to mean that the act has to be done, that the underlying felony has to be done -- I'm sorry, that the assault has to be done in furtherance of the underlying felony in the sense that it has to actually advance the aim or the goal of committing the underlying felony.

The Courts have held that simply -- mostly in felony murder cases where the language is exactly the same, the in furtherance language, exists as well, that

the act could be completely inconsequential to the actual goal of committing the underlying felony such as robbery cases where the defendants are fleeing and they strike and hit an unsuspecting pedestrian and kill that pedestrian. There's several cases that deal with that, that certainly the killing of that pedestrian in fact impeded their ability to complete the robbery because these defendants were caught after the accidents. Yet the murder of that civilian was sufficient to satisfy the in furtherance of language.

THE COURT: Because they were trying to get away presumably.

MR. DENNEHY: They were but my point is that the killing didn't help them get away. It didn't further their ability to complete the robbery. It impeded their ability to complete the robbery. So therefore in that instance --

THE COURT: Tell me the cite for that, this case that you're describing.

MR. DENNEHY: The case I am describing is, a robbery occurs. The defendant gets in an automobile and attempts to flee the police.

THE COURT: Right.

MR. DENNEHY: And in the course of the chase, he strikes and hits another car, killing the car's

occupant.

THE COURT: Right.

MR. DENNEHY: The police then arrest the defendant.

THE COURT: Right.

MR. DENNEHY: In that instance, the killing of the other motorist did not further the underlying felony which in this case was the robbery. It actually impeded his ability to complete the robbery because it meant that he --

THE COURT: Well he was running away. So it didn't impede his ability -- I mean this was he was trying to get away from the police.

MR. DENNEHY: My point --

THE COURT: And in the course of making his escape, he wound up killing someone.

MR. DENNEHY: Correct.

THE COURT: That I could understand. I am having trouble with the concept --

MR. DENNEHY: Well the whole --

THE COURT: -- that in this particular case, that the -- he came out shooting to prevent the undercover police officers from taking the gun from him. It doesn't seem -- I mean I think Judge Gleeson is a wonderful judge. I have the utmost respect for him but I

am just trying to wrap my head around the notion that a rational juror could conclude that these people came out essentially shooting to prevent the cops from -- the undercover police officers from getting the gun. It doesn't -- it just like to me doesn't make any sense.

MR. DENNEHY: It's a bit awkward but again, in light of the -- whether the trying -- in light of the deferential standard applicable to habeas petitions and in light of the way New York courts have consistently interpreted this in furtherance of language to not strictly mean that the assault or the murder has to actually further the commission of the underlying felony. It wasn't unreasonable for the Appellate Division to reject this claim.

THE COURT: Well I mean that's one thing when they're trying to get away, I could understand that.

MR. DENNEHY: But there's --

THE COURT: But I don't -- I just find it -- well tell me, the Jackson v. Virginia standard is the one that I apply or do I ask whether the New York Court of Appeals or whichever was the last court, the Appellate Division here --

MR. DENNEHY: It's the Jackson v. Virginia standard.

THE COURT: Yes. So it's not a question of

deference. That's the standard that applies in a federal case, as well. Do I -- what I was saying is do I ask the question whether they unreasonably applied Jackson v. Virginia or is it just simply the Jackson v. Virginia standard?

MR. DENNEHY: Uh-huh.

THE COURT: And my understanding is that it's the Jackson v. Virginia standard. So I am not -- tell me if I am wrong. I mean --

MR. DENNEHY: That's my understanding, as well, Judge.

THE COURT: So that we're dealing with -- and we're not dealing with that -- the deference in -- at least with the sufficiency of the evidence test, it's the Jackson v. Virginia test which is the traditional due process test.

MR. DENNEHY: Right. And I believe --

THE COURT: Whether any -- and your argument is that a rational juror could have concluded that they came out shooting to prevent the police from taking the gun that they were shooting them with?

MR. DENNEHY: Well that was certainly part of it. I mean it was reasonable to assume that in a purported gun sale, that the purchase of the guns would be people familiar with guns and would possibly have

guns.

THE COURT: Yes, I agree with that but they were shooting at them, not to prevent the other guys from taking the guns from them. I mean I just can't wrap my head around that concept.

MR. DENNEHY: It was part of the gun possession, that they wanted to maintain possessing the guns and then you --

THE COURT: What guns?

MR. DENNEHY: -- could you then --

THE COURT: The ones that they had in their hand or the non-existent guns?

MR. DENNEHY: No, the ones they had in their hands. And they knew that the people that they wanted to rob might have been armed, they would fire the guns at them in an effort to disarm them or disable them so that they could commit the robbery. But not only does it --

THE COURT: Yes, but you see --

MR. DENNEHY: But not --

THE COURT: That would be easy if that's what the Judge charged here.

MR. DENNEHY: Admittedly it more logically supports a finding that it furthered the robbery.

THE COURT: They intended to rob him and that's what they -- you know, they played out the scenario to

the point where these copes -- undercover police officers were not going to give him money unless they saw guns, so they came out and they started shooting because they were going to take money from them. I mean it's just --

MR. DENNEHY: Just because it furthers the robbery doesn't mean it can't concurrently also further the weapons possession. It could serve dual aims in the firing of the guns. It could complete the crime of weapon possession and it could be intended to also prevent the police from taking the weapons.

THE COURT: What's the status of this Cherry case that Judge Gleeson decided?

MR. DENNEHY: I believe --

THE COURT: Is there -- did it go up? I didn't notice whether he granted the certificate or not.

MR. DENNEHY: No, he didn't grant a certificate in this case. I don't know. I could follow-up with the Court and inform the Court about the status.

(Court and clerk confer.)

THE COURT: We'll find out the answer in a second.

MR. DENNEHY: Okay.

THE COURT: Refresh my recollection. Am I to remember now -- did the Appellate Division say anything more than the usual, the evidence was sufficient and they

find the claim to be without merit?

MR. DENNEHY: I don't think they did but let me look and check.

MR. LANDAU: No, it was boilerplate -- it was just boilerplate. Evidence was legally sufficient. The issue was preserved but the evidence is legally sufficient and it's not against the weight of the evidence.

THE COURT: Well I don't deal with the weight of the evidence.

MR. LANDAU: Right, I understand that.

THE COURT: And is there any case other than Judge Gleeson's -- I mean any New York State case that, you know, other than these meaningless, the evidence is sufficient discusses this theory of yours? That --

MR. DENNEHY: There's a case that my opponent cites that talks about CPW and legal sufficiency and assault -- so there's the CPW count and the assault one count and the in furtherance language in the assault count and the sufficiency of it. But I think it's rather conclusory and doesn't go into details.

MR. LANDAU: Yes, I think it's Williams (ph.), I think is the name of the case.

MR. DENNEHY: Right.

MR. LANDAU: 255 AD 2d. I was not able to find

any other case that had substantially similar facts and from the Williams case, you can't really tell what the facts are. I would state that I think that the New York Court of Appeals has somewhat undermined the theory on which the People are relying to sustain this conviction, the People v. Cahill (ph.). Cahill cited a couple of out of state cases. One of the cases was a case -- was it in -- I think it was Williams -- I'm sorry Parker v. The State in Arkansas where the defendant was charged with felony murder for burglarizing a home in order to kill its occupant. The charge of the in furtherance language of the capital felony statute wasn't satisfied where in that case because the homicide didn't further the burglary, the burglary furthered the homicide.

It was kind of a bootstrapping case, something similar to I think what the People's or at least one of the People's theories is here. This is kind of a bootstrapping to argue that --

THE COURT: I'm sorry. This is complicated so repeat what you said.

MR. LANDAU: Okay. What I was saying was in People v. Cahill, the New York Court of Appeals I submit at least somewhat undermined the theory on which the People are relying. That's not a weapons possession and felony assault case but Cahill cited with approval an out

of state case, Parker v. the State in which the prosecution tried to rely on the burglary as to -- excuse me --

THE COURT: They wanted to enter the house --

MR. LANDAU: Well, yes, they want -- they burglarized the home in order to kill an occupant.

THE COURT: Right.

MR. LANDAU: The homicide didn't further the burglary. The burglary furthered the homicide but the People were arguing the opposite. And as I said, in Cahill, the Cahill court cited that case with approval and that's sort of a bootstrapping-type argument that was made in Parker which is I think at least somewhat similar to the bootstrapping argument that the People are making here that somehow the shooting at Officer Marquez furthered the possession of the gun that was in Cherry's hand or one or the other defendant's hands since we're not completely clear on, you know, which -- which shooting actually --

THE COURT: I wouldn't have any problem -- I mean I understand your argument on the robbery but I wouldn't -- I think the evidence was -- if this charge here had been that the gun was being possessed for the purpose of facilitating the robberies, it would be an open and shut case.

MR. LANDAU: I have no --

THE COURT: I mean I think he knew that they planned -- I think a jury could conclude, let me put it this way, that they planned to -- that they could plan to carry out a scheme to rob these people -- to get -- if they could have gotten the money without shooting them, they would have gotten the money -- they would have taken it without shooting them but in the end, they planned to rip them off and use violence in the process.

But the problem is the way this Judge -- it's not inevitable from the way the crime was indicted that it had to be submitted to the jury in this way.

MR. DENNEHY: Well I would just reiterate though that the in furtherance of language is not to be taken literally. It's -- there's a line of cases -- there's two of them that I am aware of with arson cases where the defendant lights a fire, flees the scene, firefighters come, firefighter perishes in the fire, defendants caught and indicted and convicted a felony murder. That's an instance in which the death clearly had little to no relationship whatsoever to the arson. Of course the firefighter died as a result of a arson. There was causation there, if you will.

THE COURT: All right. So let's assume, as a result -- and I mean somehow that doesn't trouble me. I

mean one of the reasons you don't want people committing arson is because somebody could get killed in the fire, whether it's a fire person or somebody in the house.

MR. DENNEHY: But my point is, is that it's not -- it doesn't further the crime of arson. That's why that -- that language is interpreted in a very loose way.

THE COURT: Let's assume it is interpreted in a loose way. It's still -- to say that it's being given a liberal interpretation doesn't mean that you -- that it -- that you carry it to what seems to me to be somewhat illogical extreme here.

MR. DENNEHY: Well I think with the liberal interpretation, I think there are sufficient facts in this case to conclude that the gun -- that the assault was in furtherance of the gun possession.

THE COURT: (inaudible) Cherry.

MR. LANDAU: Right.

THE COURT: I think that's the last --

MR. LANDAU: Right.

THE COURT: I think that's the last (inaudible).

MR. LANDAU: I don't --

THE COURT: It may be that the --

THE CLERK: You need to speak up, Judge.

THE COURT: It may be the last entry that the

record came back but I mean that's the last significant entry on the docket sheet.

MR. LANDAU: As a -- maybe perhaps a minor point on Cherry, that's -- Judge Gleeson's decision relating to the merits of the claim is really dicta. There was -- that issue, as far as Cherry goes was unpreserved. There was a procedural default and there was no cause. So it's really --

THE COURT: I don't know but he addressed the merits.

MR. LANDAU: Well he did address the merits.

THE COURT: He did.

MR. LANDAU: I am just saying that because there was --

THE COURT: Oh, I see what you mean because --

MR. LANDAU: Because there was no cause it's sort of --

THE COURT: Well I understand what you're saying because even though he addressed the merits, there was a procedural default and that could provide the basis for the Court of Appeals not granting a certificate. I assume that's what you're saying.

MR. LANDAU: Well it's part of it. I am just saying that his addressing the merits wasn't necessary in this case because of the lack of procedural defaults.

THE COURT: I know but he addressed it and he's of, in my view, a brilliant and thoughtful judge. I mean I think he's one of the starts in the court. It's the only thing that gives me pause here. Otherwise this thing doesn't make a hell of a lot of sense to me.

MR. LANDAU: Also, we don't know -- we don't know, at least not from the papers I have seen so far, whether Cherry made the same arguments that we're making here regarding Malagon (ph.).

THE COURT: Regarding what?

MR. LANDAU: Malagon. The -- regarding the charge that had to be in furtherance of the weapon possession.

THE COURT: Oh, he did.

MR. LANDAU: And specifically --

THE COURT: I mean I think he basically --

MR. LANDAU: Why it is --

THE COURT: He says at first glance it may seem artificial to describe the assault as in furtherance of the group's possession. It's more natural to say the act was in furtherance of their main aim which was to rob Robert and Marquez of the money, that as gun buyers, the undercover detectives were assuming to be carrying.

And then he goes on to say nevertheless, this is plain, there was sufficient evidence to find the

requisite nexus between the underlying felony and the serious injury inflicted on Marquez. I don't want to read the whole thing but it says in so doing, Cherry and his accomplices were committing the crimes of criminal possession of a weapon in the second and third degree and opening fire on the detectives, Cherry and his accomplices while also furthering their primary aim of committing a robbery simultaneously sought to further their criminal possession of the weapons. The assault was intended to prevent the detectives who might have been and in fact were armed from taking possession of the weapons during the robbery.

MR. LANDAU: Right.

THE COURT: I mean that's the -- I mean that's exactly the argument that the District Attorney is making here.

MR. LANDAU: Maybe I am parsing --

THE COURT: I mean, I don't -- maybe I --

MR. LANDAU: I may be parsing a little bit, your Honor, but our argument has been that not only did the people have to prove that it was -- that the assault was in furtherance of generally criminal possession of a weapon but specifically, criminal possession of the 22 caliber weapon because the petitioner was acquitted of criminal possession of the nine millimeter weapon. I

don't know whether Cherry --

THE COURT: I don't know if -- I don't understand the significance of that. First of all, you know, it may be inconsistent verdicts in state -- you know, that -- you know, the fact that the verdicts may be inconsistent is immaterial in federal court. But suppose they did, I mean what's the difference between the nine millimeter --

MR. LANDAU: Well --

THE COURT: What is the relevance between the nine and the 22 --

MR. LANDAU: The nine millimeter guns were the ones that were supposedly the subject of the gun sale.

THE COURT: Right.

MR. LANDAU: The 22 caliber wasn't mentioned as being the subject of a gun sale.

THE COURT: Right. So the theory would have to be that this shooting of the detective was done to retain the 22 that Cherry and the other co-defendants had to shoot the detectives or to retain the nine millimeter guns.

THE COURT: That's not -- I don't understand that that's the theory. The theory is in opening fire on the detectives, Cherry and his accomplices were furthering their primary aim of committing a robbery

simultaneously sought to further their criminal possession of those weapons. The assault was intended to prevent the detectives from taking possession of the weapons during the robbery. That's what, as I understand the theory, that it was -- that's what the submission was to the jury.

MR. DENNEHY: That's right, your Honor, although it wasn't as specific as that. The Court merely read the statute.

THE COURT: So how do we know they didn't find that the robbery was the underlying crime?

MR. DENNEHY: Because that wasn't what was charged.

MR. LANDAU: The Court did charge that the underlying felony had to be criminal possession of a weapon.

MR. DENNEHY: But didn't -- what I was speaking to as -- was the part of the decision that talked about their using the weapons in an effort --

THE COURT: Please stop for one second. I -- this is urgent, otherwise I would never do this.

(Off the record)

THE COURT: I'm sorry, go ahead.

MR. DENNEHY: That's okay. I was simply saying that the Court didn't mention to the jury about a finding

that the weapon possession, that the guns were being used and fired at in an effort to retain them to complete the weapon possession. That wasn't part of the Court's charge.

THE COURT: So what did he say to them?

MR. DENNEHY: The Court said that the -- you know, it charged the language of first degree assault and said that in order to find the defendant of the first degree assault, he went through the elements of the crime and then he mentioned that the underlying felony associated with the first degree assault was the weapon possession.

THE COURT: So that was basically --

MR. DENNEHY: Yes.

THE COURT: I mean that's basically it.

MR. DENNEHY: Admittedly, just in -- no further detail was given as to how the jury should evaluate the evidence.

THE COURT: So he never instructed them on the meaning of in furtherance.

MR. DENNEHY: Don't know the answer to that; the level of detail that was given on the in furtherance language. I did not bring the transcript.

MR. LANDAU: I believe I actually have the transcript here.

THE COURT: We have it upstairs if you don't have it here.

MR. LANDAU: I'm pretty sure I do. I tried to take the summations and the charge.

MR. DENNEHY: I actually have -- the charge is summarized in the defense brief in the Appellate Division. Okay. The Court charged the standard language. Read the first degree assault statute, said but in the course of and in furtherance of the commission of a felony or immediate flight therefrom, he or another participant if there be any causes serious physical injury to any other -- I'm sorry, to a person other than one of the participants.

The Court added, "When during the actual commission of the felony, the criminal possession of a weapon or in the immediate flight therefrom, one of the participants causes serious physical injury to a third person, the one who caused the serious physical injury and all others as well are guilty of assault in the first degree. Under the law, it does not matter that the act which caused such serious physical injury was committed unintentionally or accidentally rather than any intention to cause serious physical injury. The participants are guilty of assault in the first degree as though each had committed the act which caused the serious physical

injury and as though each had done so intentionally."

So that's where the reference to the weapon possession comes in. He said "When during the actual commission of the felony, the criminal possession of a weapon or in the immediate flight therefrom." So it's there that the underlying felony is identified as the weapon possession.

THE COURT: And could he have identified it as a robbery? I mean was he precluded from the wording of the indictment or did he just pick this out of the air?

MR. DENNEHY: He was not precluded from charging it as a robbery.

MR. LANDAU: The indictment was in general. I don't believe it identified a particular underlying felony but the Court's charge did.

THE COURT: Not that it matters, but we don't even know what the grand jury -- what basis the grand jury indicted here.

MR. DENNEHY: I viewed the indictment and there was no robbery charges or attempted robbery charges. So apparently those charges weren't submitted to the grand jury. There was more -- there were attempted murder charges. There were assault charges.

THE COURT: No, no.

MR. DENNEHY: Right.

THE COURT: All you know is what is in here. You don't know what theoretically the grand jury might have not indicted because they didn't want to indict but we don't know what theory -- I see what you're saying, because they didn't indict on the robbery charge, then they must have been charged on this by the prosecutor.

MR. DENNEHY: That's the presumption.

THE COURT: And if I disagree with you, I grant the writ as to the whole thing?.

MR. DENNEHY: Is that a question?

THE COURT: Yes, if I disagree with you.

MR. DENNEHY: Oh, I see. In other words, does the weapon possession survive?

THE COURT: Well the weapons possession -- which count -- would they all go down the drain?

MR. DENNEHY: Well he was convicted of one count of second degree weapons possession and the main count of first degree assault.

THE COURT: The second degree, the weapons possession would also go down, I mean, the way I understand it. What is second degree weapons possession?

MR. DENNEHY: It's when one uses or attempts to use a weapon unlawfully. So it involves the use, the actual use or attempted use of the weapon. And I believe under the acting in concert theory, that the people

presented in this case, there was more than sufficient evidence to conclude that this defendant acted in concert with his accomplices in the firing of the weapon. So that charge would stand.

THE COURT: And what count is that?

MR. DENNEHY: That's criminal possession of a weapon in the second degree. It's Criminal Procedure Law -- I'm sorry, Penal Law Section 265.03(2).

THE COURT: And what did he get on that count?

MR. DENNEHY: Five years.

THE COURT: Which he served.

MR. DENNEHY: Correct. He's doing 25 on the first degree assault count.

THE COURT: And could you think of a reason why it wasn't in furtherance of a robbery, wasn't charge as the basis for the predicate? Why would somebody choose such a -- even with -- or how did Judge Gleeson describe it?

MR. DENNEHY: Is your question why the Judge didn't include that in his jury instructions?

THE COURT: Yes.

MR. DENNEHY: Or why it wasn't charged in the accusatory instrument?

THE COURT: Well I don't -- why did the Judge do it that way?

MR. DENNEHY: Maybe because of the mis --

THE COURT: Even Judge Gleeson says it's artificial, describe it as assault in furtherance of a group's weapon's possessions.

MR. DENNEHY: Admittedly --

THE COURT: It just seems to me to be --

MR. DENNEHY: Admittedly very awkward, although the People's submission is that's legal.

THE COURT: Well did the district attorney ask him to charge it this way?

MR. DENNEHY: No, I don't think there was colloquy about it, if memory serves.

THE COURT: WAs there any objection to the charge?

MR. LANDAU: Not that I am aware of. The prosecutor certainly didn't request that it be charged in furtherance of a robbery. I can't speak as to the rational for not doing it. I don't believe there was a robbery charge in the indictment itself, so maybe that had something to do with it. But anything else I would say would be speculation.

THE COURT: What's the cite to Cahill, by the way, the case you --

MR. LANDAU: 2 NY 3d. 14. Do you need the New York Supp. site?

THE COURT: No.

MR. LANDAU: Okay. And I think the page -- it's a long case, so the pages on which that particular point are located are 69 to 70.

THE COURT: And the Judge never defined in furtherance to the jury.

MR. DENNEHY: I'm basing my reading of the record on a brief which necessarily doesn't include all of the language. I don't want to make a representation that there was no additional language. Would it be helpful to give you the page cite of where he talks about the charge itself, the first degree robbery charge?

MR. LANDAU: Yes.

MR. DENNEHY: Okay. That cite is 1123.

MR. LANDAU: Yeah, it's 1123, goes through 1126. The only thing that the Judge charged on page 1126 relating to the in furtherance language was that the jury could consider factors such as the time between the commission of the crime which was criminal possession of a weapon and the infliction of the injury, the distance between the location of the possession of the weapon and the place at which the serious physical injury was inflicted and all of the other evidence educed at the trial. That's the only elucidation the Judge gave on the in furtherance language.

THE COURT: So I mean it seems to me what you're arguing really is they came out with the intent to commit a robbery. They came out essentially shooting and because arguably that could have the effect of -- I mean I can't even articulate this theory that it would have the effect of preventing the cops from taking the guns away from them, that that satisfied the in furtherance of.

MR. DENNEHY: Well the argument's twofold. That's one part of it. It would have the effect of preventing the cops -- that it would have the effect of preventing the cops from taking the guns away from them, thus enabling them to maintain possession and to continue the crime of criminal possession of a weapon in the second degree.

The first part is that when they came out firing their guns, they're completing -- they're in the midst of completing the criminal possession of a weapon in the second degree by actually firing their weapons at the officers. During the course of that, the bullets are discharged from their weapons and strike the officer in the hand. therefore, the temporal proximity and the --

THE COURT: I know about that but the statute requires in furtherance.

MR. DENNEHY: Right. But it's the People's

position that the in furtherance of language is not meant to be read literally. That the act is not specifically meant to further the crime.

THE COURT: How would -- give me your definition of in furtherance.

MR. DENNEHY: My definition would be --

THE COURT: No, if you want you don't have to give it to me now. I don't want to -- if you want to think about it and give me a letter afterwards, that's okay, too.

MR. DENNEHY: I would prefer that, so I would rather articulate it in a precise way --

THE COURT: Okay.

MR. DENNEHY: -- rather than just firing off the cuff here.

THE COURT: Why don't you do that?

MR. DENNEHY: Thank you.

THE COURT: And I will reserve decision.

MR. LANDAU: Judge, if I might, I would just like to hand up a decision I discussed with counsel. I gave him a copy. It relates more to the other point about the knowledge as to the purpose of the transaction and whether the --

THE COURT: Look, I think he knew -- I think a jury could find, let me put it that way, that there was

sufficient evidence that he knew. particularly -- I mean even without the disbelief of his testimony but particularly given the jury's ability in a case in which the evidence was already sufficient in my view, the jury could take into account their disbelief of his denial. There's a line of cases that holds that, federal cases anyway, that holds -- there's a NInth Circuit case which is a -- I have in a bench memo that was prepared but I will give you the NInth Circuit case but it's really -- believe me, there is Second Circuit law that holds it. It's US v. Selby in 557 F.3d 968, 976. It's a 9 Cir. (2009). But it's -- there are Second Circuit cases. I just can't remember off the top of my head. There's one by Judge Frank and --

I will reserve decision.

MR. DENNEHY: Thank you, your Honor.

MR. LANDAU: Thank you, your Honor.

THE CLERK: Thank you, counsel.

(Matter concluded)

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C E R T I F I C A T E

I, ROSALIE LOMBARDI, hereby certify that the foregoing transcript of the said proceedings is a true and accurate transcript from the electronic sound-recording of the proceedings reduced to typewriting in the above-entitled matter.

I FURTHER CERTIFY that I am not a relative or employee or attorney or counsel of any of the parties, nor a relative or employee of such attorney or counsel, or financially interested directly or indirectly in this action.

IN WITNESS WHEREOF, I hereunto set my hand this **20th** day of **April** , 2010.

Rosalie Lombardi
Rosalie Lombardi
Transcription Plus II